

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING  
PORTSMOUTH, NEW HAMPSHIRE  
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**7:00 p.m.**

**CITY COUNCIL CHAMBERS**

**August 15, 2006**

**MEMBERS PRESENT:** Vice-Chairman David Witham, Steven Berg, Alain Jousse, Bob Marchewka, Arthur Parrott, and Alternates Carol Eaton and Henry Sanders

**MEMBERS EXCUSED:** Chairman Charles LeBlanc, Duncan MacCallum

**ALSO PRESENT:** Lucy Tillman, Chief Planner

---

Vice-Chairman Witham called the meeting of the Board of Adjustment to order at 7:00 p.m. He welcomed to the Board Ms. Carol Eaton, who was recently appointed as an Alternate Member.

~~~~~

**I. OLD BUSINESS**

- A) Approval of Minutes – May 23, 2006
- Approval of Minutes – June 20, 2006

A motion was made, seconded and passed unanimously to accept the May 23, 2006 minutes as corrected and the June 20, 2006 minutes as submitted.

~~~~~

B) Petition of **Michael De La Cruz, owner**, for property located at **63 Congress Street a/k/a 75 Congress Street Franklin Block** wherein a Variance from Article XII, Section 10-1201(A)(2) was requested to allow a 10' two accessway to a below grade parking garage where 24' is the minimum required. Said property is shown on Assessor Plan 117 as Lot 5 and lies within the Central Business B, Downtown Overlay and Historic A districts. *This item was tabled at the July 25, 2006 meeting.*

It was moved, seconded and passed by voice vote to remove this item from the table.

Chairman LeBlanc announced that the applicant had requested that the petition be tabled to the September meeting.

It was moved, seconded and passed by voice vote to table the petition.

~~~~~

C) Petition of **Dennett Prospect Realty Investments LLC, owner**, for property located at **69 Prospect Street** wherein the following were requested: 1) a Variance from Article III, Section 10-

Approved September 19, 2006

301(A)(2) to allow two free-standing buildings with dwellings on a single lot where dwellings are required to be in one building, and 2) a Variance from Article III, Section 10-302(A) to allow an irregular shaped 1,232.5± sf footprint two story building to be constructed on the same footprint as the existing 1,232.5± sf one story building which is being demolished. Said property is shown on Assessor Plan 142 as Lot 29 and lies within the General Residence A and Historic A districts. *This item was tabled at the July 25, 2006 meeting.*

Mr. Marchewka made a motion to remove the petition from the table, which was seconded by Mr. Parrott and passed by voice vote.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney John Bosen stated he was representing the applicants. Mr. Tom Ferrari, the general contractor, was also present.

He described the property as formerly two adjacent lots with two separate buildings on each lot. One was a 6-unit apartment building and the other what was referred to as the bakery building. They propose taking the 6-unit down to 4 units and the bakery building to 2 units, with a net total of 6 units. They had received permission from the Board last August to do renovations, after which they went to the Technical Advisory Committee, Planning Board and Historic District Commission and received those approvals. During the process, they discovered that the bakery building foundation was cracked and needs to be removed. The walls currently were concrete cinder blocks and the plans approved by the Historic District Commission and the Planning Board were for clapboards. They propose to partially remove the foundation, take down the cinder block walls and replace them with historical appearing clapboards.

With respect to the foundation and referring to the site plan a copy of which was in the Board packet, Attorney Bosen indicated the part on the bakery building that was crumbling. They need to move the little ell shaped section of the foundation and to do this, they need relief.

Mr. Jousse stated for clarification that on their map, it doesn't say "bakery building," but "carriage house".

Attorney Bosen stated it was Lot 29 on the tax map. He reiterated they need relief from Section 10-301(A)(2) and from the setbacks of 10-302(A). With respect to 10-301(A)(2), they were requesting to combine two lots into one lot by way of voluntary merger. This was a bit academic because they received the Board's approval last year to consolidate the lots and, in the process of going through site review, created a voluntary merger document which was executed and recorded at the Registry of Deeds. Nevertheless, the decision to grant did make sense in this case because they were taking two non-conforming uses and making one less non-conforming lot. They would provide parking and relieve setback issues. They also now meet open space requirements.

Attorney Bosen stated they also seek relief from Article 3, Section 10-302(A) to allow them to demolish part of the foundation and replace the walls, considering the setbacks. The plans show an irregular shaped building of 1,232 s.f. One of their plans had always been to make this building more historical looking. Clapboards have been approved by the Historic District Commission. In order to accomplish that, they need to remove cinder block walls. He also noted that the foundation was cracking and crumbling on the left side, which they refer to as the ell. His client was prepared

to move forward and would like to create a new foundation. If they had gone forward based on existing approvals, it would have been a very expensive project because the foundation would have to be repaired. The building would be much safer with a new foundation and new walls.

Addressing the criteria for granting, Attorney Bosen stated there would be no decrease in the value of surrounding properties. The structure was old and dilapidated. They were proposing to spend over \$200,000 to renovate. With respect to the bakery building, it would have new walls and a stronger foundation. This would have a positive impact on the neighborhood, increase the value of the property and increase tax revenue. There would be no additional noise, odor or traffic and no risk to the general public.

Attorney Bosen stated there were special conditions which allowed the applicant no other feasible way to achieve the benefit. The property was unique and had a zero lot line. Again, it had been through the whole site review process and permission had been received from the City to renovate. What they're proposing tonight would have no impact on the pre-existing non-conformity. It would not be possible to renovate without imposing an unreasonable financial burden because of the costs of renovating a crumbling foundation.. The proposal is to build in the same footprint, as had been before the Board and site review. If they moved the foundation, it would be a much more expensive process. Because they have already worked with and received site review approval, they would like to proceed as approved.

Stating that this was a classic Boccia case, Attorney Bosen added that the proposal would not be contrary to the ordinance. Safety and welfare would be improved and combining the two lots lessened the non-conformity. There will be parking where before there was none. There would be little or no impact on City resources. He stated that to allow Mr. Dennett to go forward would be substantial justice as he already had gone before the various boards and received approval to renovate.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Mr. John Pendelton stated he represented Ian and Janice Turner who live along Prospect Street. While they basically support the proposal, his clients have one concern. Looking at the site plan, it appears that the property line was off the side of the building, running along the side of the building and along the asphalt drive. His clients own the property behind the carriage house and have a parking space between the carriage house and their house. Their two concerns are that the right-of-way stay the exact same width. If it narrowed, it would be difficult to get rescue vehicles down that street or right-of-way. He was stating they were not really objecting because he believed they had reached an agreement to ensure this with the applicant. The other concern was that they still be able to make the turn into that parking space. One of the plans shows that a post right at the corner would prevent them from doing that. He believed they had also reached an agreement on that. He wanted to put these concerns, on which he believed they had reached agreement, on record. With those two conditions, they hope the Board would vote in favor.

Vice-Chairman Witham asked if a point he referenced on the plan as "IP Set" was the iron post Mr. Pendelton had mentioned and if, with building in the same footprint, his clients could still drive to the rear.

Mr. Pendelton answered “yes’ to both questions. As long as the post was not put there, they could have access. His clients probably have restrictive rights to the property right up to the house, but they are not asserting that claim as long as they can still use the parking space.

In response to a further question from Vice-Chairman Witham, Mr. Pendelton indicated they had reached an agreement, but not signed it. They had not had time before the meeting so he wanted to put this on record.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Mr. Parrott stated he had an inquiry. There had been a change since they Board last saw this. The two lots in question had now been consolidated so it could be said that it was now a new, or a different, lot in that it was larger than either of previous ones. The variance that had been requested was appropriate but raised the question in his mind as to whether they had to address additional concerns. He had two. Article Two, Section 10-206, Table 2, with respect to the General Residence A zone, which this is, allowed a maximum of four units per lot. They now have one large lot with six units.

Secondly, the same Section 10-206, Table 2 specifies 3,000 s.f. per family per lot. The proposal would be 18,000 s.f. and this lot was less and failed on size. He wasn’t sure if these were questions, but these variances had not been requested so his point was whether this was a technical issue.

Ms. Tillman responded that, in August of 2005, the Board had given approval with the understanding that the lots would be combined and there would be the six dwelling units. That approval was still current, including parking. The only difference now was that the building was coming down and they were not just putting a second story on it. That is the only reason they have to come back. Everything else has gone through all the boards. That was the whole purpose last year.

Mr. Parrott agreed that was the action taken before, but to his mind the question was whether now they had a new situation because the lots actually were combined and so registered. He felt that, now, that lot was in violation of two additional requirements and he wanted to be sure they couldn’t be challenged later on for lack of being complete.

Vice-Chairman Witham stated they had to view the approvals as a whole, including those of the other boards and not try to look at it in sequential order where one step triggers other new requirements. This was all presented in good faith; everyone knew what was being proposed; and it was all approved in that manner. He was comfortable moving forward.

Mr. Marchewka asked if they had not approved a variance for the single lot.

Ms. Tillman stated that the rearrangement of the dwellings on the lot was approved, and part of that approval was the combination of the lots. They had done many of the steps in the process to get the building permit and this came up at the last minute where they have to get re-approval for new construction as opposed to just adding a second floor. It was fully approved to this point and it was just that last point.

Mr. Parrott agreed, but to his mind, it was an inadvertent oversight, but it did trigger his review for those other two points.

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Vice-Chairman Witham stated they had two variance requests before them and that the first variance was previously approved. Before, they approved two units to go into a renovated building. Now they were asked to approve it going into new construction.

Mr. Marchewka made a motion to approve the request as presented and advertised, which was seconded by Mr. Jousse. He stated that the only difference from the previous variance granted was that here they want to rebuild a portion of the existing structure. There was no change whatsoever from the original plan, which he had previously supported. The buildings will be updated, safer and less expensive to build than renovation.

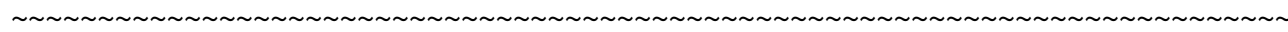
He stated that the protection of the public interest would be the same as in the granting of the last variance. There were special conditions in the property in that the foundation was in disrepair and needed to be replaced. There was no other reasonably feasible method to achieve the benefit as it would not be reasonable to require applicant to repair the foundation as opposed to replacing. There would be added cost and the physical structure would not be as good. There was no effect by replacing cinder block with another type of wall.

Further addressing the criteria, Mr. Marchewka stated that the Board had felt it was in the spirit of the ordinance to grant the petition originally and, with minor changes, could allow again. Justice would be done by allowing the owner to replace a portion instead of renovating, while making it safer. He saw no diminution in the value of surrounding properties.

In seconding, Mr. Jousse stated he agreed. Unfortunately, when renovating, more problems are found than anticipated. Apparently this was the case with this venture. The footprint was the same as was approved and what was there now. It would be in everyone’s best interest to have a new structure vs. a structure repaired and done piecemeal. The neighborhood would have a new building and new construction would be safer and easier for the applicant to work with.

Vice-Chairman Witham stated he would also support. The end product would be the same as previously approved, but be of sounder construction.

The motion to grant the petition as presented and advertised passed by a vote of 5 to 1, with Mr. Parrott voting against the motion.



**II. PUBLIC HEARINGS**

- 1) Petition of **Theodore W. Weesner, owner**, for property located at **36 Kent Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 376 sf irregular shaped deck and stairs with: a) a 2’± right side yard where 10’

is the minimum required, and b) 27.6%± building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 113 as Lot 38 and lies within the General Residence A district.

### **SPEAKING IN FAVOR OF THE PETITION**

Mr. Theodore Weesner stated he lived at 36 Kent Street and was there with his son, Stephen Weesner. They were seeking permission to replace a rotting deck, strengthen the stairway and extend 2' to the side to help support the fence. He stated the house was non-conforming and stands 2' from the lot line. There was a fence which enhanced the privacy for his house and the neighbors. Currently, struts add stability to the tall fence. He stated that currently the gap between the deck and the fence is a catchall where litter accumulated. The solution to the problem of the gap seemed to them to be to close the gap while replacing a rotting deck and add cement footings on that side for deck support and stability for fence. They would add stringers for the stairway, railings and a small sleeve to deck. He presented two additional photographs which indicated the nearness of the old deck to the fence.

Mr. Weesner stated he also had a note from the neighbors most impacted, Michael and Teresa Geraci, which he read for the record. He stated that they indicated that his proposal would not affect or disturb their lifestyle in any way and they supported it. Granting the variance would not inflict any hardship on abutters, stated Mr. Weesner, as both fence and deck were architecturally sound, of the highest quality and would enhance property values. There would be no light or air problems. They appealed to the Board to grant approval of their request.

Mr. Berg asked if, in the close-up photographs submitted in the packet, Mr. Weesner had drawn in red where the railing used to connect and Mr. Weesner stated, "right."

Mr. Berg asked, in looking at that, immediately to the right, was that a door or window.

Mr. Weesner stated it was a window. There was a sliding glass door adjacent to that window.

Mr. Sanders asked if there had been any comments from the neighbor on the other side or to the rear.

Mr. Weesner indicated that the neighbor to the rear supports and was there to speak that night. He had approval from the neighbor on the left as they were simply replacing a deteriorating deck with a much more attractive new deck – the same general footprint except they wanted to extend the deck to connect to the fence because there was the awkward gap.

Vice-Chairman Witham asked that the letter from his neighbor be submitted for the record.

Mr. Berg asked if that was the neighbor on the other side of the fence and Mr. Weesner stated, "yes."

Mr. Marchewka asked Ms. Tillman whether they were voting on the new deck.

Ms. Tillman responded, "yes" because the other one was completely demolished and they're building a new, larger, deck which can be seen in the photographs in the packet.

Approved September 19, 2006

Mr. Marchewka stated so, they were not considering this a reconstruction, even though that's what's been proposed by the applicant.

Ms. Tillman stated that what was advertised was to build an irregular shaped deck. She felt there was some misunderstanding with the applicant. Once you remove a deck, you start all over again, the same as when you remove a garage within a side yard setback, you have to seek a variance to rebuild it entirely. This deck was not only being removed and rebuilt, but was enlarged and increasing the non-conformity on the right-hand side, being 2" from the side line and the coverage.

Mr. Weesner stated that it was his understanding that if you remove a portion of the structure in its entirety, you have to start from scratch. They retained very substantial concrete footings and used the existing joist hangers. Although he understood the technicalities of the language and the requirements, they really did not entirely remove the deck. They were replacing a rotted deck for every positive reason.

Mr. Marchewka asked if they had built the original deck.

Mr. Weesner stated it was there when they bought the property in 1989.

Ms. Tillman stated that they could find no approvals in any of the files granting relief for the original deck that was there and which had now been ripped down and rebuilt.

Mr. James Horrigan stated that he lives at 35 Elwyn Avenue, which is the house directly behind the applicants. Given the configuration of other homes in the immediate neighborhood, they were really the only abutters who see this deck. Prior to the deck removed, looking from the rear, they could see a very small landing and steep steps, which appeared unbalanced. Once the deck was installed, the lines of that house improved tremendously. They like looking at it and, to his eye, the new deck seemed the same, although there was a slight addition to attach it to the fence. The workmanship was high quality and he felt property values would be enhanced.

In response to questions from Mr. Berg, Mr. Horrigan stated they had lived there for 20 years and the deck was not there when they moved in. It would have been installed between 1989, when the Weesners bought the property and twenty years ago.

**SPEAKING IN OPPOSITION TO THE PETITION, OR  
SPEAKING TO, FOR, OR AGAINST THE PETITION**

With no one rising, the public hearing was closed.

Vice-Chairman Witham stated that, if the Board decided to deny the side setback requested, the Board could grant less and allow the deck to be rebuilt in the existing footprint rather than a straight out denial.

Mr. Berg made a motion to grant the petition as presented and advertised, which was seconded by Mr. Marchewka.

Mr. Berg stated that he differed with the concept of the departmental memo that this was a replacement and needs a variance. Most of the major structural elements where the deck was attached to the house were left behind. He stated that they have a deck and have a right to have that deck continue. Nevertheless, the City's interpretation was that, if it was removed, the owners lose the right to have it. Whether the past deck had permission was no fault of this owner. There was a deck and there was a nicer one now. Ordinarily he would be troubled by something so close to the property line, but, for him, the mitigating factor was the fence, which was clearly well built, expensive and well kept. He didn't feel there was encroachment on neighbor's property rights. The fence was the barrier.

Addressing the criteria, Mr. Berg stated that it would not be contrary to the public interest and they had heard from neighbors in person or writing saying they had no problem. He didn't see values as being diminished. Justice would be in allowing the prior deck to continue to exist in the new form. It allowed better utilization of space where before 2' was wasted space. It made sense to use it as outdoor living space. In the spirit of the ordinance, the setback requirement was intended to prevent overcrowding, which this does not do. This is a better use of the space. He noted the one abutter who can see the deck had stated that he does not see the deck as visually different from before.

Addressing lot coverage, there was not even 1% of difference on a lot which already had greater than 25% coverage. This was insignificant and not a gradual erosion of the ordinance. Justice would be that it was consistent with the ordinance. The variance was needed due to special conditions. The house is to the right and already violates the setback. The deck previously was less than the required 10'. He didn't see any other way to achieve the benefit. A few feet over is a door and, no matter what is done, that door will be less than 10' from the side so any reasonable construction of a deck would also be within that setback. The fact that the fence was almost a permanent structure creates a reasonable barrier and an appurtenance to which to connect the deck.

In seconding, Mr. Marchewka stated he agreed. Mr. Weesner mistakenly removed more of the deck than he should have. That being said, the deck proposed was essentially the same as was there with the exception of a 2' extension which is minor. This was very close to property line and generally that was not something the Board likes to consider. However, there was a substantial fence along that line. Also, the house was 2' from the property line so the deck was not that much more.

Mr. Parrott stated that the reason for side setbacks was to give neighbors a little breathing room. In this case, any type of a large gathering was going to reflect over into the neighbor's yard. Lights on that deck were going to shine into the adjacent property. Variances were permanent and the Board had not granted variances in the past where property lines were crowded. He felt they would be doing a disservice to the purposes of zoning where people are entitled to privacy on their lots – and these were small lots with houses practically on top of each other. The applicants might say there was no other feasible way, but in this case, they could pull it back 5' and put up some type of soundproofing on that side of deck and build it out to the back more. The deck could be redesigned to make it better for all parties. He noted that the previous deck had been built without the benefit of City approval and this one was well framed out without the benefit of City approval. The concerns of present and future neighbors should be taken into account. The proposal should be rethought and redesigned and the applicants could come back.

Vice-Chairman Witham stated he agreed with Mr. Parrott and would not support the motion. While he believed the maker and second of the motion had some good points as to replacing the deck,



those do not hold water in terms of this expansion of the deck so that it goes right up against the fence. In the Boccia analysis, they were supposed to consider the benefit being sought. He heard two benefits, one of which was to eliminate the 2' alleyway, but this could easily have been made 3' and would have been better functioning. Sometimes they made recommendations that would cost the applicant more but, he felt, it would actually be cheaper to make the deck more conforming. Currently, it was 26' wide, which was a very wide deck and he didn't see why it had to go up to the fence.

The other benefit that seemed to be sought by this expansion up against the fence was to stabilize the fence. As Mr. Berg commented, it looked like a very well built fence and he didn't think it needed a deck to stabilize it and didn't see the need to go up against the fence. To Mr. Parrott's comments, his biggest concern was that, now the owners were friends with the neighbors, but they have to think about the future. When they look at some of the photographs with the deck going up against the fence. There was, in one corner, what appeared to be a little liquor cabinet going up against the fence. Not that he had an issue with a liquor cabinet, but this deck went right up to the property line.

Mr. Weesner interjected from public area that that was not a liquor cabinet – it was a work of conceptual art with colored bottles.

Vice-Chairman Witham acknowledged his comment, but stated his point was that this deck now goes up to the neighbor's fence.

Mr. Weesner interrupted from the public area to ask if he could make a comment.

Vice-Chairman Witham stated he could not as the public hearing was closed. He added the issue wasn't whether there were actually liquor bottles in there – if it was sculpture, it was sculpture.

Mr. Weenser again interjected and Vice-Chairman Witham again advised him that the public hearing was closed.

Vice-Chairman Witham reiterated that his point was that what was a fence was now a railing and people can go right up to the railing and look over into the neighbor's yard. The owners were not going to live there forever and they don't know what the future owners might do. There could be a gathering and they were really right on top of the neighbors who might be in their back yard and enjoying their space with someone looking down on them. He thought there needed to be more respect. The purpose of zoning was to give everyone more space. It was also important to have continuous flow around the structure on a property line. He would support rebuilding the deck in the footprint that they had, which was big enough, but he couldn't support going right up to the property line.

Mr. Sanders stated that there were many situations in this town where decks were extremely close. They were a very pronounced part of properties. With respect to neighbors, good judgement should be used in terms of noise, sound and lights and you have to count on each individual to make that decision in good context with respect for their neighbors. He stated the applicant had answered the questions he had.

Mr. Jousse stated he agreed with the Chair and would not support the motion. He visited the site and the fence looks like a very sound structure, which doesn't appear to need support or bracing. To build a deck larger than what was there before, to the edge of the property line, was not a sound practice.

Mr. Marchewka stated he understood the reluctance to grant something that close but the house was 2' from the property line. He didn't think it would make any difference and looks very insignificant. If a loud party were held on that deck, the neighbors would hear it anyway.

Mr. Berg stated that, if his count was correct, there would be 4 votes against, which effectively would deny the deck. He asked if it were possible for him to withdraw his motion and reintroduce it as allowing what was existing to be built, respecting at least a 2' 2" setback from the side fence consistent with the house setback.

Vice-Chairman Witham stated his count was 2-3, with one undecided. The maker of the motion can change his motion.

Ms. Tillman stated he would have to withdraw his motion and the second withdraw his motion.

Mr. Berg stated he would let it ride.

The motion to grant the petition failed to pass by a vote of 3 to 4.

~~~~~  
2) Petition of **Golter Lobster Sales LLC, owner**, for property located **off Sagamore Avenue known as 929 Sagamore Avenue** wherein a Variance from Article III, Section 10-301(A)(9) was requested to allow access to the lot off a private right of way to construct an additional 12' x 24' one story addition to a previously approved barn for water related uses where access is required from a public street or an approved private street and access is provided from an existing right of way. Said property is shown on Assessor Plan 223 as Lot 28 and lies within the Waterfront Business district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Joseph Golter stated he was the property owner. They want to add a 12' x 24' one-story addition off an already approved barn. This would have the same purpose as the lobster business. He stated the hardship on the property is that the only access was from a private right-of-way.

Vice-Chairman Witham stated that the initial request had been heard and granted in May.

Mr. Berg asked Ms. Tillman if he understood correctly that, because of the lack of immediate road frontage, any construction requires a variance. The Board had approved a building, but the applicants were making a change so they have to come back before the Board.

Ms. Tillman stated that was correct.

**SPEAKING IN OPPOSITION TO THE PETITION, OR**

**SPEAKING TO, FOR, OR AGAINST THE PETITION.**

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Berg made a motion to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Berg stated that, in making his motion, he would like to invoke by reference all of the discussion and reasons for granting the original variance. He added that, on a large lot, a 12' x 24' addition would be completely insignificant. This was a technicality. As they had discussed before, construction of anything required a variance because of the lack of street frontage. He listed the standards for granting a variance and stated that, as with the original, all were met.

Vice-Chairman stated this might also concern use of the property.

Mr. Berg stated that, then the Simplex analysis would apply. In addition to his previous remarks, he stated that this was a reasonable use of the property in what was a very unique setting. No fair and substantial relationship exists between the ordinance and the restrictions on the property. The problem was access. The applicants should be allowed to use their lots while not interfering with the with the rights of others. They had already been granted a 26' x 32' structure. This expansion would have no impact on anyone.

Mr. Parrott stated he agreed. This was very straightforward and similar to what had been approved in the past. The addition would not crowd any property lines or infringe on others.

The motion to grant the petition was passed by unanimous vote of 7 to 0.



3) Petition of **Sarnia Properties Inc., owner, KFA On-Line LLC, applicant**, for property located at **933 US Route 1 ByPass, a/k/a 4 Cutts Street** wherein a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) was requested to allow a warehouse, offices and distribution center including shipment of internet (online sales) orders. Said property is shown on Assessor Plan 142 as Lot 37 and lies within the Business district.

Mr. Marchewka stepped down for this petition.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech stated that the applicant was affiliated with the Kittery Trading Post and referred to a letter in the packet outlining what they intend to do. The property was the former Portsmouth Paper building – now vacant – and they were appearing for a Special Exception as the Planning Department had determined that the situation was that they were going from a non-conforming use to a less-conforming use. This was dealt with in Section 10-401(A)(1)(d), which states an existing non-conforming use may be changed to another non-conforming use provided that the proposed is equally or more appropriate to the district and the impact on adjacent properties is

less adverse. In that case, the application should be dealt with by Special Exception. He stated the telling factor was that the use was less intense. He compared the previous and present tasks on-going on the site and stated the biggest indicator was that the number of employees was estimated at 20 to 40. Portsmouth Paper had over 50 on-site. There would be less deliveries by heavy vehicles.

Attorney Pelech listed the criteria for granting a Special Exception and how he felt they were met. There would be no hazard to the public or adjacent property from fire or toxic materials. The use was not a high hazard use and there would be no storage of dangerous materials on-site and no danger from fire or explosion.

There would be no change in character of the building which was not being changed. The parking would not be changed. There would be no increase in odor, noise, pollutants, vibration, or glare. Regarding the issue of traffic safety, there should be a substantial decrease in traffic congestion. The demand on municipal services would be roughly the same as before and no impact on schools or inordinate demand for police or fire protection. There would be no changes to the site that would affect storm water runoff.

Attorney Pelech reiterated that they would be going from one non-conforming use to one less non-conforming. There would be a retail component, which was allowed in the district.

Mr. Sanders asked if there was potential for increased traffic in the future due to customer pick-up.

Attorney Pelech stated they were not anticipating any direct customer pick-up as a result of on-line sales. While there might be a special circumstance where a customer needed to make a pick-up, this would be very limited.

Vice-Chairman Witham stated that was also a concern of his as people might want to avoid sales tax by picking up.

Attorney Pelech reiterated that, while retail was an allowed use, that type of situation was not contemplated at that time.

Vice-Chairman Witham questioned the signage, asking if people would be attracted to the site by seeing Kittery Trading Post.

Mr. Adams from the Kittery Trading Post stated they don't want the public to think of this as one of their sites. They don't anticipate this as a retail location. He explained their plans and the limited circumstances in which a customer might pick-up from the site.

Mr. James Kenney stated he owns the building and, while not a direct party to the arrangement between Portsmouth Paper and the applicant, wanted to speak in favor. He felt this was an ideal use, that truck traffic would be less and the impact on the neighborhood minimal. Some jobs that had been lost might be replaced. They may come back to the City at some point for an improved building.

## **SPEAKING IN OPPOSITION TO THE PETITION**

Ms. Barbara Pamboukes stated she lived at 91 Cutts Street. While she was not opposed, she was concerned about firearms and ammunition, parking and traffic. There was a dangerous intersection, with a lot of traffic between the building and Hanscom Truck Stop. She wondered if there was a way to direct traffic, including that of employees, to the Route One By-Pass instead of Cutts Street.

Mr. Adams stated that most firearms and ammunition, along with any hazardous materials, like white gas and butane would remain at their main facility as they require special storage. They have been in touch with the Portsmouth Fire Department who have no concerns with their moving into the facility as long as they don't have what might be considered hazardous materials. With respect to parking, they plan on using the parking lot off Cutts St. Unlike Portsmouth Paper, they had a lot of high dollar items. In order to secure the building, they would have one entrance for employees and one for others. They were not planning on using the upper lot area.

Ms. Pamboukes asked for clarification on the parking lots.

Mr. Adams indicated the one on the right will be for employees. He reiterated there will be no hazardous materials stored at the site. Before any could be stored, would require a review from the Fire Department and sprinkler system changes.

In response to questions from Mr. Jousse and Mr. Sanders, Mr. Adams stated that when they were talking about the front of the building, they were referring to the side on Cutts Street. Any storage of kayaks or other items would be in a secured, covered area. There was no intention for any outdoor storage.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Mr. Berg made a motion to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Berg stated that this seemed to be a less intense and less non-conforming use than what was there before. The applicants could have continued a more non-conforming use, but a less-conforming use requires a Special Exception. He noted that the applicant's attorney had gone through the list of criteria, which was now part of the record, and he was satisfied that all the conditions had been met as stated. He felt the resident's concerns on traffic issues had been addressed by the applicant. There should be less truck traffic, which was better. He was also satisfied with respect to any danger from hazardous materials. It made sense that the owner would not want to jeopardize the property.

Mr. Parrott stated that the use would be a good fit for the neighborhood and the city at large. Concerns they normally would have with respect to lights, odors, etc were not going to apply and he didn't feel any stipulations were needed.

Mr. Sanders stated he also agreed and would support the motion.

Approved September 19, 2006

The motion to grant the petition was granted by unanimous vote of 6 to 0.

~~~~~  
4) Petition of **Christopher and Petra J. Barstow, owners**, for property located at **528 Dennett Street** wherein a Variance from Article IV, Section 10-402(A) was requested to allow an 8' x 8' shed with 31.6%± building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 161 as Lot 10 and lies within the General Residence A district.

Mr. Jousse stepped down for this petition

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Chris Barstow stated he was the owner of the property and, while he was away, his son and friend build a shed for him in his yard without realizing that a permit was required. Now that they are aware, they were requesting it. He stated that the hardship for him was that there was nowhere to store outside equipment and allow him to clean up the yard area. He noted that this was only a 1.3% increase in lot coverage. As a result of some calls to the Building Department from neighbors regarding the appearance of the shed, they had dressed it up and he presented a picture of the improved shed.

In response to a question from Mr. Sanders regarding any input from neighbors, Mr. Barstow stated they had heard nothing either way, except for the initial calls to the department. They had used the same materials as the house to spruce it up. He noted that there were much greater land uses in their neighborhood on the small lots.

Mr. Witham noted that the memorandum from the Planning Department indicated it was a half a percent increase in lot coverage from the current, so it was less than Mr. Barstow had presented.

**SPEAKING IN OPPOSTION TO THE PETITION**

No one rose.

**SPEAKING TO, FOR, OR AGAINST THE PETITION**

Mr. Alain Jousse, speaking as a member of the public, stated he lived at 197 Dennett Street and stated there was a discrepancy as far as the packet was concerned. He believed the frontage on the schematic was 67' and change. He had a copy of the city's tax map to present to the Board. It delineated the frontage on Dennett Street as 61'. If it was 61' feet, it appeared that the side of the house was already 10' or less from the property line and it presented a side yard problem with the shed being 8' wide. It would be 2' away from the residence which would place the edge of the shed either on City property or right on the property line.

Vice-Chairman Witham asked if the overall lot size differed from what was presented.

Mr. Berg stated that what Mr. Jousse had handed him was exactly what he was going to ask. He read from the handout that "this map is for assessment purposes only. It is not intended for legal description or for conveyance....building footprints may not represent current structures..." He felt

it was a meaningless piece of paper. He asked Mr. Jousse if he had checked a deed or seen a survey.

Mr. Jousse stated, “no.”

Mr. Berg stated he had been handed a document which was for assessment purposes only and not for determining lot lines. It said it shouldn't be used the way Mr. Jousse was using it.

Mr. Jousse maintained it was a City record and showed 61' of frontage and the packet had said 67' and change.

When Mr. Berg asked him if he was, then, relying on the tax map, Mr. Jousse stated, “yes.”

Mr. Parrott noted that the tax map had the lot at 61' x 80' and the sketch in the package presented to them had 67' x 105', if he read it correctly, which was a huge difference in both directions. The rough sketch showed the lot as being much larger in both directions than the tax map. His question was which, if either, was accurate and what else was the basis for the coverage computations they were considering. It seemed to him there was quite a discrepancy.

Vice-Chairman Witham asked if the tax map had a property size.

Mr. Marchewka stated it was 4,879 s.f..

Mr. Berg suggested that they ask the property owner where his dimensions came from.

Vice-Chairman requested Mr. Barstow to come to the podium and asked him if he had produced the site map.

Mr. Barstow stated that he had. They had tried to locate pins in the past and could not find them. As far as the depth dimension, he had gone from the center of the new sidewalk to what they deemed to be the back property line as they had understood it. There was a fence there for years, prior to their purchase.

Mr. Parrott asked if he had a knowledge of what the tax card showed and Mr. Barstow stated he did not.

Ms. Tillman stated that they had a copy of tax card but that was not going to give the dimensions of the lot. It did note the square footage.

Mr. Marchewka stated the square footage was 4,880.

Vice-Chairman Witham asked if, when applicants filled out the building permit application, the 64 s.f. added for the shed accounted for the 31.6% lot coverage based on the 4,890 s.f. lot size. His point was that there was lot coverage variance and wanted to be sure the numbers being used were accurate.

Ms. Tillman stated that the calculations were based on 4,879 s.f..

Vice-Chairman stated that, using the applicant's dimensions, the lot size was over 6,700 s.f.. There may have been some discrepancies in the lot lines presented on the plan, but he felt that the lot coverage they were presented was accurate and that a setback issue would have been picked up on by the Planning Department. He asked the Board if they felt they should go forward.

Mr. Berg stated that it appeared to him that the likelihood was that the lot was larger than the tax map shows. He found it hard to believe that the owner would be off by that much. If the lot were larger, further examination might show they didn't need a variance at all. He couldn't imagine the lot being smaller than presented so he felt they could go ahead. If anything, reality might there was less non-conformity than they thought.

The Vice-Chairman agreed.

Ms. Eaton asked for confirmation that the sidewalk had been measured from the middle.

Mr. Barstow indicated "yes."

Ms. Eaton stated that was not where a property line should be measured from.

Vice-Chairman Witham stated that, on these older streets a lot of property lines encompass the whole sidewalk. The worst case scenario, lot coverage-wise, was what was before them as the smallest lot size.

Mr. Barstow indicated there was no sidewalk on the Stark Street, only the Dennett Street side, so they could lose 3' of depth on the property.

Vice-Chairman stated that, if they were there for a setback variance, he would need more information, but he felt they could move forward because the lot coverage numbers were accurate.

Mr. Berg concurred that they were applying for the variance under the worse case scenario. He asked the owner how far the shed was from the house.

Mr. Barstow indicated it was a foot and a half.

Vice-Chairman Witham again commented about moving forward with the request.

Ms. Eaton asked for clarification that the variance was only for lot coverage.

Ms. Tillman stated that, on the issue of the setback, they take representations from the owner as to the location of the property lines. They don't require surveys so they've taken information from the property owner as to location and the only thing that needed addressing was the building coverage issue. If there was a setback issue and it was less than 5' from the side property lines, then they would have to come back for a variance. Sheds less than 100 s.f. and less than 10' in height to the midpoint to the level of the eaves would require a 5' side and rear property lines. If the plan showed the shed to be in conformance and that turned out not to be the case, they would have to come back for a side yard variance. However, as Mr. Witham said, she had used the most conservative figure so the coverage should be accurate.



Vice-Chairman asked that all in favor of moving forward say aye. By unanimous voice vote, it was decided to move forward with the petition.

With no one further rising, the public hearing was closed.

**DECISION OF THE BOARD**

Vice-Chairman Witham called for the decision relative to lot coverage and noted that, if there were to be an issue with the setback, the owners would have to come back before the Board.

Mr. Marchewka made a motion that the petition be granted as presented and advertised, which was seconded by Mr. Berg.

Mr. Marchewka noted that the request was a lot coverage issue for a shed. This was not a permanent structure; it had no foundation; and could be moved. He felt it was a minor request with the smallest shed that could be built. He didn't see that the neighbors would be affected as it was on the street side, behind a fence. Although they were over the limit for lot coverage, he didn't feel there would be overcrowding as there were no neighbors on that side.

The public interest would not be affected for the reasons he had just stated. The special conditions would be that it was a small storage shed that had been put in, which by its nature was temporary. The homeowner had taken pains to make it physically blend in with the house and the small size and location of the shed were such that it would not interfere with the abutters in any way, including property values. He stated that it was in the spirit of the ordinance to allow a temporary structure to house outdoor clutter.

Mr. Berg agreed. While there might be a question on dimensions, that would not be resolved without a survey which would be expensive and he didn't believe the City would require it under these circumstances. He felt the paved surface of the road was far enough away from the property line and that the size of the property might be larger than was believed, perhaps making a variance not necessary.

Vice-Chairman Witham stated he would also support the variance as 31.6% of lot coverage was very reasonable in a dense neighborhood. That was closer to the norm than 25%. While there was some unresolved business with setbacks, if that became an issue, they could simply pick the shed up and move it.

The motion to grant the variance passed by unanimous vote of 6 to 0.

~~~~~  
5) Petition of **SGB & RGB Ventures LLC, owners**, for property located at **1800 Woodbury Avenue** wherein a Variance from Article III, Section 10-304(A) was requested to allow a 2,292 sf one story building with: a) a 4'± left side yard where 30' is the minimum required, and b) a 68'± front yard where 70' is the minimum required. Said property is shown on Assessor Plan 239 as Lot 7-3 and lies within the General Business district.

**SPEAKING IN FAVOR OF THE PETITION**

Approved September 19, 2006

Attorney Bernard Pelech stated he was appearing on behalf of SGB & RGM Ventures for the same variance that had been granted in 2004 and which had expired after having been extended. Since that time, the applicant had gone back to the Conservation Commission and received favorable recommendation and also received a favorable conditional use from the Planning Board and Site Review. He stated the property was the Gerber Dental Clinic, which was in the General Business district. The property had been sub-divided in the early 1990's as part of the Durgin Lane shopping center. The Home Dept was to the rear and, across the street, was BJ's Wholesale Club. The surrounding uses reflect the zone. What was being proposed was the same 22,092 s.f. one story building that was approved in 2004. The proposed location was 4' from the left side yard. That side yard is an imaginary indistinguishable line that runs through the middle of the Circuit City parking lot. It was 68' from Woodbury Avenue where 70' was required.

Addressing the standards, he stated that there were special conditions attached to the property in that one quarter of the property was wetlands and he noted this lot had been created prior to the City of Portsmouth enacting the Wetlands Ordinance. The second factor was that 90% of the lot was either wetlands or in the wetlands buffer. There was only a very small portion along Woodbury that was buildable. The third factor could be shown on the large plan, which he held up. The Gosling Meadows property was in a residential district and he indicated the corner of that property. He noted there was 100' setback from property zoned residential in the City. That precluded the applicant from putting the addition there. Any expansion would require a variance.

He stated that the benefit sought could not be achieved by any other method. The building was not designed structurally for a second story. What the applicant was proposing was to the left of the existing structure, abutting the Home Depot parking lot and replacing pavement. He circulated a set of photographs which showed where the building would be constructed.

Attorney Pelech stated that the request was consistent with the ordinance with regard to setbacks allowing for light and air and preventing overcrowding. There was approximately 300' of open parking lot separating this property from the next. There was a 68' front yard setback and ample room for emergency vehicles. The lot coverage and open space requirements were met. The spirit of the ordinance was not going to be violated by an imaginary property line running between Circuit City and this structure.

He stated that the hardship on the owner if denied was not outweighed by some benefit to the public. The new structure would enhance tax base to the public benefit, would not require an inordinate increase in services or an increase in traffic. If denied, applicant would suffer a hardship because they could not use the land as proposed. Conditional use had already been granted and, 4' from the left side line and 68' from the front would cause no diminution in property values. It would also be in the public interest to have a new structure creating additional jobs. He Board had found that the criteria were met in 2004 and, hopefully, would find the same that evening.

Mr. Sanders asked why there had been a delay.

Attorney Pelech stated there had been two delays, one originally in 1997 when the then property owner passed away so the project didn't go forward. In 2004, the present owners purchased and were granted a variance. It took almost a year to get the conditional use permit and site plan

review. Due to a combination of factors, the owners had not gone forward with the plan although it had been extended in 2005.

**SPEAKING IN OPPOSITION TO THE PETITION, OR  
SPEAKING TO, FOR, OR AGAINST THE PETITION**

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Jousse moved to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Jousse stated that this would not be contrary to the public interest and that special conditions existed. The property was encumbered by a residential district and wetlands so that there was no other location in which to put the proposed building. Nothing negative had been presented as far as property values were concerned.

Mr. Parrott stated that the building as proposed was appropriate for the area and consistent with the building beside it. The property was heavily encumbered by setbacks and the appropriate approvals to build within those setback had been obtained. The only variance was to one side which was already developed with pavement so the project would not adversely affect anything.

Mr. Berg stated that, as far as the front setback 2’ was insignificant. If they look at the plan, the applicants were trying to make it look more attractive by making one building mirror the other and continue straight along to be uniform. Only a very small portion of the building was violating the 70’ rule. As far as the side setback and the reasons for them, this was a dense commercial area, with no observable way to tell where the property line was. There was no threat of creating too much density or violating privacy of a neighboring property. This was just a big parking lot and, although 4’ from an invisible property line was a very substantial distance from any other structure.

The motion to grant the petition was passed by unanimous vote of 7 to 0.



**III. ADJOURNMENT**

It was moved, seconded and passed to adjourn the meeting at 9:25 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary